

**Iowa Department of Natural Resources  
Environmental Protection Commission**

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**ITEM**

**14**

**DECISION**

**TOPIC**

**Notice of Intended Action – Chapter 135 Uniform Environmental  
Covenants Policy and Procedures.**

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The Department proposes to amend sections of Commission rules applicable to the use of "institutional controls" at leaking underground storage tank (LUST) sites (ch. 567-135) and sites enrolled in the land recycling program (LRP) (ch. 137) in order to implement provisions of the "Uniform Environmental Covenants Act" (2005 Iowa Acts, S.F. 375) enacted in 2005. The notice also proposes a new chapter entitled "Environmental Covenants" which establishes the policy and procedures for implementing the use of environmental covenants in accordance with S.F. 375.

S.F. 375 created a new real estate instrument called an "environmental covenant" which the Department is authorized to use as an "institutional control" to impose and enforce certain "activity and use limitations" on contaminated property in order to manage the future risk of unacceptable exposure to contaminants.

Wayne Gieselman  
Administrator  
Environmental Protection Division

December 27, 2005

## **ENVIRONMENTAL PROTECTION COMMISSION [567]**

### **Notice of Intended Action**

Pursuant to the authority of Iowa Code sections 455B.474 and 455B.105, the Environmental Protection Commission (Commission) proposes to amend Chapter 567 Iowa Administrative Code (I.A.C.) 135, entitled "Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks" and Chapter 567 I.A.C. 137, entitled "Iowa Land Recycling Program and Response Action Standards". The proposed rules also establish a new Chapter 567 I.A.C. 13, entitled "Environmental Covenants". The amendments implement provisions of 2005 Iowa Acts, Senate File 375 (S.F. 375) which amends sections of Iowa Code chapters 455B and 455H (codified in 2005 Iowa Code Supplement) and creates a new Iowa Code Supplement Chapter 455I, entitled "Uniform Environmental Covenants Act." S.F. 375 establishes a new real estate instrument called an "environmental covenant" which may be used by owners of property, responsible parties and other interested parties, the Iowa Department of Natural Resources (Department) and other State and Federal regulatory agencies as a type of institutional control for the purpose of restricting land use activities and managing the risk of future exposure to existing contaminant conditions.

Iowa Code Supplement section 455B.474(1)(f)(4) authorizes the Commission to adopt rules regarding the application of institutional controls and specifically the use of environmental covenants created in accordance with Iowa Code Supplement chapter 455I as part of a Department approved corrective action plan at leaking underground storage tank (LUST) sites regulated under Commission rules in chapter 567 I.A.C. 135. Iowa Code Supplement section 455H.206 authorizes the use of environmental covenants created in accordance with Iowa Code Supplement chapter 455I as one form of institutional control to satisfy remedial standards under the Land Recycling Program (LRP) established in Iowa Code Supplement chapter 455H and implemented by Commission rules in chapter 567 I.A.C. 137. Iowa Code Supplement section 455B.103 grants the Director of the Department broad discretion to enter into environmental covenants and accept and maintain other types of real property interests.

These amendments remove prior references in chapter 567 I.A.C. 135 to the use of a common law deed restriction called a "restrictive covenant" which the Department has used as an institutional control prior to enactment of S.F. 375. These amendments remove prior references in chapter 567 I.A.C. 137 to an "environmental easement" which the Department had been authorized to use as an institutional control prior to enactment of S.F. 375. The amendments to chapters 567 I.A.C. 135 and 137 require that environmental covenants utilized in both the LUST and LRP programs conform to the standards established in a new chapter 567 I.A.C. 13 entitled "Environmental Covenants".

Iowa Code Supplement 455I.4(1) specifies certain general provisions, which must be included in an environmental covenant. Iowa Code Supplement 455I.4(2) grants the

parties to the environmental covenant broad discretion to negotiate additional provisions. The proposed rules in new chapter 567-13 prescribe minimum standards and review procedures and clarify certain provisions, which must or may be included in an environmental covenant. The proposed rules reserve the Department's authority to negotiate discretionary provisions on a case by case basis and identify some discretionary subject areas, which may be included in environmental covenants.

The proposed rules recommend the environmental covenant be drafted in accordance with a model form developed by the Department in order to achieve uniformity and more efficient review and approval. Covenants submitted using the model form and model language and in accordance with the rules would be granted presumptive approval when submitted to the Department for review. The rules provide flexibility by granting parties the option to propose revisions to the model form and language to satisfy the mandatory or discretionary provisions as stated in rule and expressed in the model environmental covenant forms.

The rules have proposed discretionary provisions which would give the Department authority to for example require notice of a change in property ownership, a substantial change in use of the property and notice of non-compliance with the activity and use limitation by subsequent transferees of the affected property. The Department is also proposing disclosure and reference to the environmental covenant in a groundwater hazard statement as provided in Iowa Code section 558.69 when the Department or the grantor determines that conditions on the affected property would require disclosures in a groundwater hazard statement as provided in Iowa Code section 558.69. This provision requires disclosure when the Department determines that a solid waste disposal site is "potentially hazardous" or if "hazardous waste" as defined exists on the site. The Department is specifically soliciting public comment on the general subject of what type of notices should be mandatory or discretionary provisions in an environmental covenant and under what conditions these notices might be required.

The proposed rules in chapter 567-13 describe the procedures for submittal and review of a proposed environmental covenant and minimum supporting information and documentation which must be provided the Department in order to review, approve and sign the covenant. The amendments provide that the Department will generally sign the environmental covenant in the capacity as an "agency" as defined and in Iowa Code Supplement 455I.2(2) and referenced in Iowa Code Supplement section 455I.3 without taking an interest in property as a "holder." However, the Department is reserving the discretion to sign on as a holder taking an interest in property. The Department is specially interested in comment from the legal community and others on these amendments and the general subject area of what quality and quantity of supporting documentation should accompany a draft covenant. The Department is specifically requests comment from the legal community as to whether there are legal or practical considerations that should be taken into account with regard to the question of whether the Department signs as a "holder" with an interest in property or in its capacity as an "agency" with all the enforcement and other rights granted by S.F. 375.

Any interested person may submit written comments on the proposed rule amendment on or before \_\_\_\_\_. Written comments should be sent to the Iowa Department of Natural Resources, Attn. David Wornson, Wallace State Office Building, Des Moines, IA 50319, fax 515-281-8895, or e-mail david.wornson@dnr.state.ia.us. A public hearing shall be held on \_\_\_\_\_, 2006 in room \_\_\_\_\_, Wallace State Office Building, Des Moines, IA for the purpose of soliciting comment on these proposed rules.

These rules are intended to implement Iowa Code sections 455B.474 and 455H.105.

The following amendments to Chapter 135, 137 and new chapter 567-13 are proposed.

**ITEM 1.** Amend sub-paragraph 567-135.12(8)"a"(4) by reference to an environmental covenant:

**135.12(8) *Use of institutional and technological controls.***

*a. Purpose.* The purpose of an institutional control is to restrict access to or use of property such that an applicable receptor could not be exposed to chemicals of concern for as long as the target level is exceeded at applicable points of exposure and compliance. Institutional controls include:

1. A law of the United States or the state;
2. A regulation issued pursuant to federal or state laws;
3. An ordinance or regulation of a political subdivision in which real estate subject to the institutional control is located;
- 4.. An environmental covenant as provided in 2005 Iowa Code Supplement 455B.474(1)(f)(4)(f) and in accordance with the provisions of 2005 Iowa Code Supplement chapter 455I and 567-chapter 13.

**ITEM 2.** Amend paragraph 567-137.7(2)"e" to reference an environmental covenant.

*e.* An environmental covenant established in accordance with 2005 Iowa Code Supplement chapter 455I, 2005 Iowa Code Supplement section 455H.206 and 567-Chapter 13.

**ITEM 3.** Rescind sub-rule 567-137.7(3) and amend as follows:

**137.7(3). *Environmental Covenants.*** Participants may submit a draft environmental covenant to the Department for review and approval in accordance with rules in 567-chapter 13.

**ITEM 4.** Amend Sub-rule 567-137.7(6) as follows:

**137.7(6) *Enforcement of institutional and technological controls.*** Institutional and technological controls which have been incorporated into a no further action certificate pursuant to rule 137.10(455H), or have been approved prior to issuance of a no further action certificate, may be enforced in Iowa district court by the department, a political subdivision of this state, the participant or any successor in interest to the participant as provided in Iowa Code Supplement section 455H.206(4). Enforcement of the terms of an environmental covenant shall be in accordance with 2005 Iowa Code Supplement chapter 455I, 567-Chapter 13 and the terms of the covenant.

**ITEM 5.** Amend sub-rule 567-137.7(8) as follows:

**137.7(8) *Modification and termination of institutional and technological controls.*** A participant or successor in interest to a participant, or an owner of property subject to an institutional or technological control, may seek approval from the department for the removal, discontinuance, modification or termination of an institutional or technological control. The persons must demonstrate that the control in its present form is no longer required to ensure compliance with applicable standards. The person seeking revision must undertake sufficient risk assessment and provide sufficient assessment data to establish that the applicable compliance standards can be met based on the proposed modification. The department may also determine based on a revised assessment that the applicable controls are no longer effective to meet compliance standards and may require other response action. The department shall issue an amendment to any previously issued no further action letter specifying the approved modification of the institutional or technological controls. Modification and termination of an environmental covenant shall be consistent with these rules, and in conformance with 2005 Iowa Code Supplement chapter 455I and rules in 567-chapter 13.

**ITEM 6.** Establish a new chapter 567 Iowa Administrative Code 13 entitled "Environmental Covenants".

**567-13.1(455B, 455H). *Definitions.*** The definitions in 2005 Iowa Acts, Senate File 375, section 6 (codified in 2005 Iowa Code Supplement 455I.2) are incorporated by reference.

"Department" means the Iowa Department of Natural Resources.

"Director" means the Director of the Iowa Department of Natural Resources.

"Source site" means the property(ies) on which the source(s) of contamination exists and which extends to or has a causal relationship to the area of concern subject to the terms and conditions of the environmental covenant.

**567-13.2-*Environmental Covenants.*** Persons requesting Department approval of an environmental covenant are responsible for the preparation and submittal of a draft environmental covenant and any accompanying documents using a model form(s) and model language developed by the Department. The Department will grant presumptive approval to environmental covenants, which conform to Department model forms and model language. The parties to the environmental covenant may propose revisions to the

model language and model form by clearly noting any proposed revisions and making a written request for consideration and approval. It is recommended that the activity and use limitation language in the environmental covenant conform to model language developed by the Department.

**567-13.3. *Supporting documentation.*** Supporting information and documentation shall be submitted with the proposed environmental covenant. Supporting documentation must be sufficient for the Department to determine the legal capacity of all legal and equitable interests in the property, the accuracy of the legal description of the affected property and its relationship to the contaminated area of concern and assure that all legal and equitable interests necessary to establish a valid and enforceable environmental covenant have been accurately identified. Documentation should include but is not limited to:

1. An opinion prepared by an attorney which represents that sufficient research has been conducted to identify all persons with a recorded interest in the affected property and other legal and equitable interests necessary to establish a valid and enforceable covenant free of any competing or subordinate property interests. Persons other than an attorney may submit supporting documentation in accordance with Department guidance developed to assist them in conducting property interest research and identification of all legal and equitable interests necessary to establish a valid and enforceable covenant. The Department may require on a case by case basis that an attorney prepare the covenant and supporting documentation and that an abstract of title be prepared or updated when necessary to identify and confirm all legal and equitable interests necessary to establish a valid and enforceable covenant. Property interests which must be identified include but are not limited to fee title and equitable titleholders (ex. contract sellers and buyers), consensual lienholders such as mortgagees, and lessees of the property.

2. Copy of a current deed, contract for deed or other property transfer instrument verifying the person(s) or business entity(ies) holding fee and equitable title in the property subject to the covenant. Proof of the legal capacity of other equitable interests and signatories to the covenant must be documented by provision of a copy of the applicable real estate instrument such as a mortgage or other consensual lien instrument.

3. A plat map or other official document which accurately depicts the boundaries of the affected property by legal description and as legally described in the environmental covenant. The map must be adequate to verify the relationship of the legally described property subject to the environment covenant to the contaminant source(s) areas, the source site(s) subject to regulation such as an underground storage tank site, the contaminated area of concern as depicted in technical documents such as soil and groundwater plume maps and to which the terms of the covenant are intended to apply and other adjoining or affected properties.

**567-13.3. *Recording and Approval.*** An environmental covenant shall be recorded as provided in 2005 Iowa Code Supplement 455I.8. An environmental covenant shall not

be recorded without approval and written signatures of the Director or the Director's appointed designee and all designated signatories. Signatures should not be obtained on an environmental covenant until it and all supporting documentation has been reviewed and approved by the Department.

**567-13.4. *Mandatory Provisions.*** The environmental covenant shall contain provisions which adequately address the subject areas designated in 2005 Iowa Code Supplement 455I.4(1). The language to address these mandatory provisions is contained in the Department's model forms but may be revised as provided in rule 13.1. The environmental covenant and any other accompanying documents shall satisfy the formatting and recording requirements of Iowa law and specifically Iowa Code section 331.606B. All environmental covenants must have a proper signature acknowledgment as provided in Iowa Code sections 9E.14, 9E.15 and 558.39. In addition to these mandatory provisions, the environmental covenant model forms shall contain provisions that satisfy the following term:

1. Require any signatory to the environmental covenant to notify the Department of conditions which would constitute a breach of the activity and use imitations contained in the covenant.

**567-13.5. *Optional Provisions.*** The Department may require additional provisions in the environmental covenant within the subject areas authorized in 2005 Iowa Code Supplement 455I.4(2) and otherwise within the Department's authority on a case by case basis. These provisions may include but are not limited to:

1. If the Department or the grantor determines that the property subject to the covenant constitutes a solid waste disposal site which is potentially hazardous or that hazardous waste exists on the property as provided in Iowa Code section 558.69, the Department or grantor may require the environmental covenant include a standard notice provision requiring disclosure and reference to the environmental covenant in a groundwater hazard statement in accordance with Iowa Code section 558.69 and Department rules in 561-Chapter 9.

2. Provisions which require notice to the Department of any transfer of legal or equitable title in the property, establishment of long term leases or substantial changes in use of the property subject to the environmental covenant. This provision may be added when the Department finds the need to monitor compliance with and maintenance of the activity and use limitations and when the risks to health, safety and the environment warrant a higher degree of oversight.

3. Provisions which place affirmative duties on subsequent transferees of equitable or legal title in the property or long term lessees to inspect, monitor or report on conditions and continued compliance related to the activity and use limitations at the property subject to the environmental covenant. This provision may be added when the Department finds the need to monitor compliance with and maintenance of the activity

and use limitations and when the risks to health, safety and the environment warrant a higher degree of oversight.

**567-13.6. *Modification and Termination.*** Modification or termination of the environmental covenant shall be in accordance with 2005 Iowa Code Supplement chapter 455I and the terms of the environmental covenant.

**567-13.7. *Signatories to the Environmental Covenant.***

1. *Agency.* The Department will sign the environmental covenant as an "agency" as defined in 2005 Iowa Code Supplement 455I.2(2), and without taking an interest in property as provided in 2005 Iowa Code Supplement 455I.3(2). The Department will generally not be a holder as defined in 2005 Iowa Code Supplement 455I.2(7). Department reserves the right to sign as a holder on a case by case basis when it determines that holding an interest in the property is beneficial to satisfying the regulatory objectives of the environmental covenant.

2. *Holders as defined in 2005 Iowa Code Supplement 455I.2(7).* The fee title owner of the affected property is required to sign the environmental covenant in the capacity as a grantor and may be required to sign as a holder/grantee if necessary to establish a valid instrument. A contract buyer holding equitable title is required to sign as a holder. When the grantor of the environmental covenant is not the owner of the source site subject to regulation, or is not the person or entity responsible for conducting corrective action at the source site, the Department may require the owner of the source site, a person or entity who is the party responsible for corrective action or the person or entity who has conducted the corrective action at the source site to sign on to the environmental covenant as a holder. The Department may require participants in an enrolled site regulated under 567-chapter 137 who have an interest in assuring compliance with the terms of the environmental covenant and particularly participants who have responsibility for corrective action or have undertaken corrective action at the enrolled site to sign the covenant as a holder.

3. *Subordinated interests.* As provided in 2005 Iowa Code Supplement 455I.3, all equitable or other property interests affected by the covenant must consent and subordinate their interest either by signing the environmental covenant or by a separate subordination and consent agreement approved by the Department. These interests include but are not limited to lessees, mortgagees and other consensual lienholders.

**567-13.8. *Notice.*** In accordance with 2005 Iowa Supplement 455I.7, persons requesting approval of the environmental covenant shall certify that copies of a recorded environmental covenant have been sent to:

1. Each person signing the environmental covenant.
2. Each person holding a recorded interest in the property subject to the environmental covenant which is not a signatory.



3. Each person in possession of the property subject to the environmental covenant including lessees, sub-lessees, assignees of a lease, and current owners and operators of the business assets on the affected property.

4. Each municipality or other unit of local government in which the property subject to the environmental covenant is located. The Department may identify the proper official or specific unit of government depending on the applicable activity and use limitations specified in the environmental covenant.

5. The current owners and operators of the underground storage tanks to which the environmental covenant relates.

6. Other persons which the Department designates including adjoining property owners.